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In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD ZALMANOWSKI, DAVE FELDMAN AND KENNETH BAKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 606 F. 2d 673. The opinion of the district court is reported at 455 F. Supp. 26.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. A petition for rehearing was denied on December 6, 1979. The petition for a writ of certiorari was filed on January 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained through judicially authorized electronic surveillance of conversations in petitioner Zalmanowski's car should have been suppressed on the ground that the government's investigative method violated the minimization requirement of 18 U.S.C. 2518(5).

2. Whether evidence obtained through the electronic interception of telephone conversations should have been suppressed because the authorizing court order did not list the number of one of the telephones that was monitored.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioner Feldman was sentenced to concurrent terms of two years' imprisonment and a fine of $7,000; petitioner Zalmanowski was sentenced to concurrent terms of five years' imprisonment; and petitioner Baker was sentenced to concurrent prison terms of one year and one day and a fine of $2,000.[1] A divided panel of the court of appeals affirmed.

The evidence at trial established that petitioners managed a widespread illegal gambling business in the Detroit area. The business included the receipt of bets on horse races and operation of a daily "numbers" game

[1]Co-defendant Elias Koury was tried and convicted with petitioners (XXXIII Tr. 3-4). Co-defendant Vito Giacalone was tried separately and acquitted.

(XIII Tr. 64). Much of the evidence at trial was obtained by judicially-authorized electronic surveillance. That evidence included conversations over telephones in the house of Louise Bruno (an unindicted co-conspirator), where Bruno recorded "lay-off" bets phoned in from bookmakers (XIII Tr. 107-110; XIV Tr. 60-79; XV Tr. 104-107; XVI Tr. 83-88; XVII Tr. 116-165, 235-279; XXV Tr. 42-52; XXV Tr. 54-70).

1. An electronic surveillance order (A. 38-44)[2] dated May 24, 1976, authorized the interception of telephone conversations on six telephones (identified by number) at three locations, one of which was the Bruno house.[3] The order also authorized the placing of a listening device in petitioner Zalmanowski's car. The interceptions were terminated after 20 days in accordance with the terms of the order.

On June 17, 1976, another order was issued authorizing, *inter alia*, the further interception of conversations over the Bruno phones and from Zalmanowski's automobile (A. 96-101). Several days later, the government learned from a monitored conversation that one of the intercepted lines was a "bootleg" phone located in the Bruno house and thus not one of the numbers listed in the

[2]"A." refers to the amended joint appendix filed in the court of appeals.

[3]The order authorized the agents "to intercept particular wire and oral communications of [petitioners] and others as yet unknown concerning the * * * described offenses, to and from the telephones used by [petitioners] and others as yet unknown, listed to Kenneth Bruno and Dennis Bruno, respectively, located at 17404 O'Conner, Allen Park, Michigan, bearing telephone numbers 313-274-5281 and 313-565-8469" (A. 41). The affidavit supporting the application disclosed that the Allen Park house was the operation's largest layoff house, and its phones were frequently busy (A. 27, 31).

order (A. 173).[4] The interception was immediately terminated, the intercept was disconnected from the bootleg phone and placed on the correct line, and the district court was promptly notified of the error.[5]

2. The government also introduced into evidence at trial tape recordings of conversations that had been intercepted, pursuant to the same judicial authorizations, from petitioner Zalmanowski's automobile with the aid of a transmitter. The transmitter could be shut off by direct manipulation, but not by remote control. Special Agent Langford, who continuously supervised the agents' monitoring of the transmissions, instructed the agents to listen only to conversations that related to the gambling enterprise and to stop monitoring altogether during the periods when no judicial authorization order was in effect (II Tr. 166; A. 274-275, 277-278). Langford testified that

[4]Before applying for the intercept order and again before making the interception, FBI agents had been assured by the telephone company that the phones identified in the application and order were the only ones at the Allen Park house (A. 171). In fact, a phone installed in a neighboring house had been run into the layoff house without the phone company's knowledge (Pet. App. 9a). The agents who made the hookup for the interception inadvertently intercepted the bootleg phone instead of one of the identified phones. When the agent, who was under observation by residents of the house as he completed the hookup on a telephone pole outside the house, checked to be sure he had intercepted the correct line, he heard a woman conveying gambling information (A. 172-173). An experienced telephone company employee confirmed that the agent acted properly in completing and checking the hookup (II Tr. 148-149, 162; A. 173-174), and the district court found that the agents acted reasonably, without negligence, and in good faith (A. 174).

[5]On August 5, 1976, a third order was issued, again authorizing interception of conversations in Zalmanowski's car and over the two listed phones in the Bruno house (A. 150-155).

the maximum transmission distance of the device placed in Zalmanowski's car was four blocks and that sometimes transmissions could not be received at a distance of only a few feet (II Tr. 200; A. 291). The transmissions from the car were broadcast on a frequency assigned by the FCC for use by the FBI (II Tr. 194-198; A. 285-289).

ARGUMENT

Petitioners present two novel challenges to the use of conversations electronically intercepted during the course of the investigation into their gambling activities. Their first challenge is to the implementation of the eavesdropping order for Zalmanowski's automobile by use of a transmitter that could not be turned off by remote control; they contend that the use of this device permitted persons other than the monitoring agents to overhear conversations taking place in the automobile. Their second complaint involves the inadvertent monitoring of a telephone line that petitioners had illegally run into the Allen Park house. Both contentions were properly rejected by the court of appeals, in an opinion on which we principally rely (Pet. App. 1a-19a). In any event, petitioners' claims do not require review by this Court. The claim regarding the kind of equipment employed to carry out the intercept order for Zalmanowski's car appears to be the only occasion on which such an issue has been presented to a court of appeals (Pet. 13, 15). Thus there is neither a conflict among the circuits nor any demonstration that the issue is important or recurring. The claim regarding interception of conversations over the bootleg telephone involves a singular set of facts that is unlikely to recur with any frequency, if at all.

1. Petitioners' claim that the interception of the conversations in Zalmanowski's car violated the minimization requirements of 18 U.S.C. 2518(5) and of the intercept orders rests solely on the type of transmitter that was used. Petitioners do not claim that the agents improperly listened to innocent conversations,[6] nor, indeed, does the record show that any conversations, innocent or otherwise, were in fact overheard by any member of the public.[7]

While petitioners make much of the danger that, by use of a radio transmitter device, the agents created the possibility of general overhearing by members of the public, no broadside attack on the use of broadcasting devices is tenable. When a court authorizes interception of oral communications, its order can be implemented either by running wire from a microphone to a receiver, where that is feasible, or by use of a broadcasting transmitter. The former method eliminates any possibility of unintended overhearings by the general public, while the latter does not. When the order authorizes interception of conversations taking place in an automobile, however, a wire hookup to the receiver is obviously impossible, and a

[6]In compliance with the intercept orders (Pet. App. 16a), the agents monitored the conversations only when two or more suspects were determined by visual surveillance to be in the car (A. 277-278, 280).

[7]Petitioners attached to their reply brief an affidavit from petitioner Zalmanowski stating that he had been informed that a conversation had been briefly intercepted by a member of the public, and an affidavit apparently reporting that incident. The affidavits do not reveal whether the overheard conversation was one to which the intercept order applied. The court of appeals refused to consider the affidavits because they were not part of the record on appeal (Pet. App. 9a n.11).

broadcasting device is manifestly the only means of executing the court's order. Under such circumstances, the use of a broadcasting device can scarcely be thought to violate minimization requirements. Cf. *Dalia* v. *United States*, 441 U.S. 238, 249-254 (1979).

Petitioners' claim therefore comes down to the contention that the use of a transmitter that broadcast continuously, rather than one that could be turned off when the suspects were not in the car, so increased the risk of unauthorized interceptions that it violated the minimization requirement. But any increase in the risk was surely very slight. As both courts below recognized, no one could overhear conversations transmitted from the car unless he had a citizen's band radio tuned to the one frequency, out of thousands available, on which the bug was transmitting (II Tr. 194-198; A. 285-289).[8] Moreover, the eavesdropper would have to remain within a few blocks of Zalmanowski's car, and perhaps much closer, as interference otherwise would prevent any reception (A. 290-291). Finally, as the courts below noted, even if someone inadvertently overheard portions of petitioners' conversations, it would be most unlikely that he would have been aware of what or whom he was hearing (Pet. App. 7a-9a). Balanced against the minimal increase in the possibility of an unauthorized overhearing was the fact that remote control devices, being electronically more sophisticated, are more likely to malfunction, requiring additional physical entries into the car (*ibid.*). In these circumstances, the agents' decision to employ the transmitter they did was justified as an effort to minimize

[8]An intentional eavesdropper would have to be aware of the FBI's undisclosed frequency or have the patience to attempt reception on every frequency (A. 283-288).

the total intrusion necessary to accomplish the authorized interception. See *Scott* v. *United States*, 436 U.S. 128, 139 (1978).

2. Petitioners Feldman and Baker contend (Pet. 15-20) that the district court should have suppressed the evidence derived from interception of conversations over the bootleg phone located in the Bruno house. Their reasoning is that because both the applications for the intercept orders and the orders themselves identified specific telephone numbers, there was neither probable cause shown nor authority given to intercept the bootleg phone.

To begin with, however, the interception of the bootleg phone invaded no rights of petitioners. Petitioners' use of the telephone in violation of the rights of the telephone company gave them no reasonable expectation of privacy within the protection of the Fourth Amendment. *Smith* v. *Maryland*, No. 78-5374 (June 20, 1979), slip op. 6-8; cf. *Rakas* v. *Illinois*, 439 U.S. 128, 138-148 (1978). Petitioners are in the same position as, for example, burglars apprehended during an unconstitutional search of the house they are burglarizing. In contrast to the owners of the house or others properly within it, the burglars, who are there as trespassers, have no legitimate privacy interest in the dwelling. Petitioners were trespassers on the telephone system, and they are in no position to claim infringement of privacy interests they never legally enjoyed. Since Congress did not intend to grant broader rights to seek suppression under Title III than are conferred by the Constitution, petitioners lack of a legitimate privacy interest in the bootleg phone line precludes them from asserting any statutory violation. See

S. Rep. No. 1097, 90th Cong., 2d Sess. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 175-176 n.9 (1969); *United States* v. *Scully*, 546 F. 2d 255, 266 (9th Cir. 1976).

At all events, as the court of appeals properly held (Pet. App. 9a-13a), there was both probable cause and sufficient authority to intercept the bootleg telephone. The affidavit in support of the initial intercept application (A. 5-37) began by detailing the general attributes of gambling operations of the type involved here. It pointed out that the use of the telephone is integral to such an operation. For "lay-off houses" like the Bruno residence, the telephone is especially important, because speed in relaying information is essential (A. 23). The affidavit indicated that the Bruno location was the organization's largest layoff house (A. 31), that informants had observed Zalmanowski calling the house to discuss gambling activities (A. 27), and that Zalmanowski had been seen visiting the house (A. 35). Only two telephone numbers were mentioned, but it is clear that the information provided was sufficient to support a district court finding of probable cause to monitor any telephone located at the Bruno house. Similarly, the order authorizing interception (A. 38-44) tracked the probable cause language contained in the application (A. 39-40) and granted authority to intercept wire communications at the Bruno house (A. 41). Although only the known telephone numbers were listed, both courts below concluded that the order "had as 'its clear purpose' the authorization to tap 'all telephones in the Bruno home'" (Pet. App. 12a). There is no need for further review of this fact-bound determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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